Supreme Court, U.S.
FILED

972083 APR 27 1998

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

EVELYN E. RICE,
and
ROBERT W. HOHLT,
Petitioners
v.

LESLEY BOROVICKA, CHERYL HOLLAND,
KATIE BROYLES, ANNE DEATON,
SHIRLEY HARRISON, DIANNE WEBB,
KATHIE GODSEY, MARK ANDERSON,
GREGORY VADNER, and
COMPLETE HEALTH CARE, INC.

On Petition For Writ Of Certiorari
To The
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMENDED PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Concerning holding that Rooker-Feldman and Colorado River abstention doctrines stand for the proposition that concurrent state court review of agency action under state's Administrative Procedures Act is a bar to a section 1983 cause of action

I. WHETHER A CONFLICT IN THE CIRCUITS EXISTS GOING TO WHETHER A CONCURRENT STATE LAW PROCEDURE IS A BAR TO A SECTION 1983 ACTION?

Concerning holding that Rooker-Feldman and Colorado River abstention doctrines stand for the proposition that concurrent state court review of agency action under state's Administrative Procedures Act is a bar to a section 1983 cause of action

II. WHETHER PURSUING THE PRESCRIBED AVENUE OF RELIEF UNDER STATE ADMINISTRATIVE PROCEDURES ACT IS A BAR TO SECTION 1983 ACTIONS?

Concerning state law procedure wherein jurisdiction originated at administrative agency - State Supreme Court holds state law procedure not an independent action originating in trial court - US District Court disagrees with State Supreme Court.

III. WHETHER A STATE CIRCUIT COURT REVIEW OF A STATE ADMINISTRATIVE AGENCY ACTION IS A CONTINUATION OF THE ADMINISTRATIVE PROCEDURE AND NOT A "LAWSUIT"?

PARTIES TO PROCEEDINGS

That COMPLETE HEALTH CARE, INC., is presently owned by Sheppard Valley Farms, Inc.

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MEMORANDUM AND ORDER of District Court dated April 7, 1997, GRANTING and DENYING various motions in Cause No. 4:96CV00669 ERW

ORDER OF DISMISSAL dated April 7, 1997 dismissing Plaintiff' Complaint in Cause No. 4:96CV00669 ERW

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review by writ of certiorari and 28 U.S.C. Section 1254(1), the January 27, 1998, denial of a re-hearing of a judgment dated December 18, 1997, of the Court of Appeals pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1291. The judgment concerns dismissal of a cause of action under 42 U.S.C. § 1983 for money damages where the underling basis for dismissal is invocation of the Rooker-Feldman and Colorado River abstention doctrines.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

Ms. Rice, an elderly blind person, was awarded public Medicaid benefits under the Social Services Block Grant Program of Title XX of the Social Security Act consisting of in-home and medical service benefits on or about January 18, 1994. Appellants believe that her eligibility for those benefits was improperly terminated due to deprivations under color of state law by the parties named herein. The deprivations alleged, include, but are not limited to no notice, no hearing, no full disclosure under discovery, no enforcement of discovery, agency refusal to permit Ms. Rice to be represented by her own attorney at the administrative agency, concealing evidence, making false statements under color of state law and conspiracy to violate Ms Rice's due process rights.

It is not the merits of the administrative case that are at issue before the federal court, but only the deprivations under color of state law which violated her due process rights, which are actionable under § 1983, along with state law claims that formed the basis for the deprivations. In the instant case, the Judgment of the United States Court Of Appeals For The Eighth Circuit affirming dismissal of the action by the District Court, is apparently not only inconsistent with the other circuits but most importantly, directly contrary to holdings of the Supreme Court Of The United States.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Eighth Circuit has entered a decision in conflict with the decisions of other United States Courts of Appeals on the same important legal issues. Further, the United States Court of Appeals for the Eighth Circuit has entered a decision on important basic legal principles based on a finding in conflict with holdings of the Missouri Court of Appeals and the Missouri Supreme Court. Moreover, the United States Court of Appeals for the Eighth Circuit has entered a decision that is a far departure from the accepted and usual course of judicial proceeding or has sanctioned such a departure by the District Court in deciding such matters in a way that conflicts with relevant decisions by this Supreme Court of the United States.[1]

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[1] [t]he Supreme Court and this court and other appeals courts have all held that the no-exhaustion rule applies to exhaustion of state administrative and judicial remedies. See e.g., Steffel v Thompson, 415 US 452, 472, 94 S.Ct. 1209, 1222, 39 L.Ed.2d 505 (1974) ("When federal claims are premised on 42 U.S.C. § 1983 ... we have not required exhaustion of state judicial or administrative remedies...."); McNeese v. Board of Education, 373 U.S. 668, 671-72, 83 S.Ct. 1433, 1435-36, 10 L.Ed.2d 622 (1963) (same); Gilmere v. City of Atlanta, 774 F.2d 1495, 1499 (11th Cir.1985) (en banc) ("[T]he right to bring an action under section 1983 need not depend on the exhaustion of state judicial or administrative procedures.... [A]ccess to federal court under section 1983 is not in general predicated on actual proof of a failure of the state adjudicatory system."); Lewis v. Hillsborough Transit Authority, 726 F.2d at 669 (no exhaustion requirement except as provided in CRIPA);

The Eighth Circuit's ruling stands for the fatally flawed proposition that if an aggrieved citizen merely appeals an agency decision under their state's prescribed avenue of redress, that citizen is barred from a concurrent § 1983 action even if ([t]he doctrine of re judicata and collateral estoppel would mean that an unfavorable state court opinion would have issue preclusive effects that would bar the party(ies) from relitigating his or her claims in federal court --- eviscerating the supplemental nature of Section 1983.)[2]

If the recent decision of the United States Court of Appeals for the Eighth Circuit is allowed to stand, it will adversely affect numerous similarly situated citizens residing in the Eighth Circuit and have a lasting negative impact on interpretation of the equal protection clause by the Eighth Circuit and limit access to federal court in this circuit under § 1983.

McKinnis v. Mosely, 693 F.2d 1054, 1056 (11th Cir.1982) (per curiam) (same); Loudermill v. Cleveland Board of Education, 721 F.2d 550, 555 (6th Cir.1983) (quoting Alacare Id. at 969)

[2] (Loudermill, 721 F.2d at 555 & n. 6; The Supreme Court, 1981 Term, 96 Harv.L.Rev. 62, 210 (1982); comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U.Chi.L.Rev. 537, 541 (1974). A decision by an administrative agency would of course not have this preclusive effect. Requiring exhaustion of state court remedies is both obviously undesirable and inconsistent with well-settled desire of congress to promote "the free, unimpeded resort to 1983." Patsy, 457 U.S. at 509, 102 S.Ct. at 2564) (quoting/paraphrasing Alacar Id. at 970.)

I. WHETHER A CONFLICT IN THE CIRCUITS EXISTS GOING TO WHETHER A CONCURRENT STATE LAW PROCEDURE IS A BAR TO A SECTION 1983 ACTION?

A conflict exists between the Eighth and Eleventh Judicial Circuits, and a conflict also exists between the Eighth and Third Judicial Circuits. Also, conflict exists between the Eighth Circuit and other circuits, i.e., (See footnotes).

A. THE CONFLICT BETWEEN THE EIGHTH AND ELEVENTH JUDICIAL CIRCUITS

1. The Eighth Circuit has, without comment, recently upheld a District Court holding that Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) is a basis for abstention under § 1983. However, the Eleventh Circuit has rejected Colorado River Id., as a basis for abstention under § 1983.

2. Appellees submitted that the District Court should invoke abstention on two alternative theories: (1) as articulated in Rooker v. Fidelity Trust Co., 236 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed. 206 (1983); and (2) as articulated in Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). To no avail, the Appellants submitted that Appellees' arguments were not valid to preclude § 1983 action. The Eighth Circuit Court of Appeals upheld the District Court holding that Colorado River was a basis for abstention under Section 1983 action.

3. However:

> [C]olorado River Water District has been rejected as a basis for abstention under Section 1983 in the 11th Circuit. Forehand v. First Alabama Bank of Dothan, 727 F.2d 1033, 1036 (11th Cir.1984) ("There is no such congressional statement ... that Sec.

> 1983 plaintiffs should be required to litigate their federal claims in state forums [sic] when actions involving the same transaction are pending in state court. If there is any presumption on this point, it would tend to run in the opposite direction."). ("... [A]ccess to federal courts under section 1983 is not in general predicated on actual proof of a failure of the state adjudicatory system." (omissions; quoting Gilmere v. City of Atlanta, 774 F.2d 1495, 1499 (11th Cir.1985) (en banc)) See Alacare, Inc.-North v. Baggiano, 785 F.2d 963, 969.

4. The Eighth Circuit upheld the District Court decision which was based on the fact that they did not want to disturb a state court holding. However, the Eleventh Circuit had no such concern for overturning a state court holding. As already quoted, the Eleventh Circuit did not believe that ruling on a plaintiff's Section 1983 claims would-impermissibly disturb a state court holding. The Eleventh Circuit believed that a Section 1983 action was not a bar to a concurrent state administrative action. The Eleventh Circuit did not make a specific ruling on whether a concurrent state administrative action was a lawsuit under Colorado River. However, by not allowing Colorado River to bar a Section 1983 action, Appellants believe it implicit in the holding that a continuation of an administrative proceeding such as the subject Chapter 536 RSMo proceeding, would not be considered a lawsuit under the Colorado River doctrine.

5. In the District Court's dismissal of the Appellant's Section 1983 claims, it is implicit they were improperly concerned about the breakdown of the state adjudicatory system. The Eleventh Circuit stated the exact opposite of the Eighth Circuit's ruling. The Eleventh Circuit held that "{A}ccess to federal court under section 1983

is not in general predicated on actual proof of a failure of the state adjudicatory system." Alacare, supra. The Eleventh Circuit was not concerned about a breakdown of the state adjudicatory system in a concurrent § 1983 action.

6. The Appellee in Alacare argued that

> "Alacare should not be heard to complain because it elected to pursue its state judicial remedy and hence should be forced to see it through."

The Appellee in that case submits that the Court should invoke the abstention doctrine as articulated in Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and decline to hear the merits. The court answered the Appellee's argument by holding:

> "the appellant only 'elected' to pursue a state court remedy because is constitutes part of the prescribed avenue of relief under the Alabama Medicaid statute." Alcara, supra, 969.

7. Appellant Ms. Rice who also elected to pursue her state court remedy, should not be penalized by not allowing her to pursue her Section 1983 action in federal court.

8. The District Court also indicated that its holding was based upon the (a mistaken) opinion or conclusion that the Chapter 536 RSMo state court proceeding concerning Appellant Rice was a "duplicative lawsuit". As argued above and elsewhere herein this Appeal, Rice was not a "lawsuit" duplicate or otherwise.

9. Given that Rice is not a "lawsuit" and given that Colorado River is not a basis for abstention under 1983, reasonable scrutiny into the merits of this appeal tend to demonstrate that there exists no balanced rational supporting the Eighth Circuit's affirmation of the District Court ruling.

B. THE CONFLICT BETWEEN THE EIGHTH AND THIRD JUDICIAL CIRCUITS

1. The recent Eighth Circuit ruling is in direct conflict with the Third Circuit in Ryans v. New Jersey Commission for Blind & Visually Impaired, 542 F. Supp. 841 (D NJ 1982) The Court in Ryans, supra, ruled that a blind individual had a Section 1983 cause of action against a state agency for denial of rehabilitative services and benefits.

2. The Court in addressing the issue of whether the Plaintiff in Ryans, supra, could bring a cause of action under Section 1983, held in FN10 at 848, that plaintiff could bring a Section 1983 action.

> "According to defendants, plaintiff is entitled to judicial review of his claims, following a final agency decision, in the Superior Court of New Jersey, Appellate Division, pursuant to N.J.Ct.R. 2:2-3(a), even if he is not provided access to this forum. Plaintiff has a substantial interest, however, in fully litigating his federal claims in federal court. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 2d 440 (1964).

A correct reading of the holding of the Court in Ryans would lead one to believe that the District Court in that case would not have dismissed the Plaintiff's cause of action in federal district court even if the Plaintiff had appealed the agency decision. The Court also said that the Plaintiff in that case had a substantial interest in fully litigating his federal claims. The Appellate Court's ruling upholding the District Court's dismissal of Plaintiff's federal due process claims is in direct conflict with the holding of the New Jersey District Court in Ryans.

3. The Eighth Circuit ruled that Ms. Rice, also a blind individual, does not have a right to pursue her state administrative remedies as well as file this Section 1983 action for the denial of her federal due process rights because of the cases being

inextricably intertwined. Ms. Rice merely followed the state's defined procedure (Chapter 536 RSMo) to appeal a decision of an administrative agency, requesting the remedies available through that procedure. She filed as well, this § 1983 cause in federal district court for violation of her federal due process rights.

There is definitely a conflict between the Eighth Circuit's recent holding, and long established holdings of the Third and Eleventh Circuits, which conflict this Honorable Court should address because presently, numerous similarly situated citizens of the Eighth Circuit are prejudiced by said holding.

WHEREFORE, we respectfully submit that this Honorable Court should hear this case and resolve this conflict because presently, numerous citizens of the Eighth Circuit are substantially prejudiced by the decision that Colorado River is a basis for rejecting § 1983 actions where concurrent state law proceedings exist. This is true even if the concurrent state law proceedings is merely a continuation of the original administrative proceedings. The Eighth Circuit's ruling should be overturned and the Appellants should be allowed to proceed with their Section 1983 action.

II. WHETHER PURSUING THE PRESCRIBED AVENUE OF RELIEF UNDER STATE ADMINISTRATIVE PROCEDURES ACT IS A BAR TO SECTION 1983 ACTIONS?

1. Appellant incorporates the preceding argument that Colorado River is not a basis for abstention in § 1983 actions, into the foregoing argument concerning the Rooker-Feldman and Colorado River abstention doctrines not being a bar to § 1983 actions.

2. Appellant sets forth the proposition that invoking the Rooker-Feldman and Colorado River abstention doctrines based upon concurrent appeal of an administrative agency

decision to State Circuit Court under § 536.100 RSMO, is a legally incorrect holding because it essentially stands for or equates to requiring exhaustion of state remedies under Missouri's Administrative Procedures Act (Chap. 536 RSMO) prior to filing of a § 1983 action. That is to say, under the rational set forth by the District Court and affirmed by the Eighth Circuit Court of Appeals in the instant case, Appellants are barred from a concurrent Section 1983 action in federal district court merely because of pending state court procedure. If this is so, the only remaining avenue of redress for Appellant Rice is to complete the prescribed avenue of relief under state law (§§ 536.100 - 536.140 RSMo) and Appellant Hohlt has no avenue of redress whatsoever under that state law.

3. Under the recent rulings of the District Court and Eighth Circuit Court of Appeals, Appellants' § 1983 cause is barred based upon invocation of the Rooker-Feldman and Colorado River doctrines. If the Court of Appeals decision is allowed to stand, Appellant Rice would have to appeal any unfavorable state court decision to the Missouri Supreme Court and if unfavorable there, further appeal to the United States Supreme Court as the federal district court and the federal appeals court do not have jurisdiction over decisions of state courts. Further, even if after a lengthy court procedure, Appellant Rice ultimately appeals to the United States Supreme Court from a decision of the Missouri Supreme Court, the issues would be much more limited than an appeal from a federal district court. The issues would be limited because state court review of administrative agency decisions are strictly limited in the scope of review (see 536.100 through 536.140 RSMo.). The full range of issues which the federal district court can hear in a Section 1983 action are simply not available in the

State of Missouri's Chapter 536 RSMo review procedure, nor does the subject state law procedure provide for a jury trial. Moreover, such a process could take many more years to complete and because Appellant Rice is elderly, there is no assurance she will survive such a lengthy process.

4. The Appellees argued that Appellants' claims in this federal case and claims in the state administrative appeal were duplicative. Even if some claims were duplicative (and we believe no claims are duplicative), other claims were not duplicative. The claims that were not duplicative should not have been dismissed, and certainly, the § 1983 claims should not have been dismissed simply because Appellant "elected" to pursue the state's prescribed avenue of redress. The state court remedy constitutes the prescribed avenue of redress under the Missouri Administrative Procedures Act statutes §§ 536.100 - 536.140 RSMO. In the instant case and the state law proceedings, it is not disputed that no notice and no hearing or trial was afforded, and that "jury" trials are barred and the types and kinds of relief are limited under Chapter 536 RSMo state law proceedings. A balanced comparison reveals that § 1983 actions provide relief which is unavailable under the State of Missouri Administrative Procedures Act, (§§ 536.100 - 536.140 RSMo).

In the case of Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed 287, 90 S.Ct. 1011 (1970), it was established that recipients of public benefits are entitled, as a matter of constitutional due process, to notice and an opportunity for a hearing before their benefits are reduced or cut off. The deprivations of notice and an opportunity for a hearing before benefits are cut off, complained of in the Rice case, was conduct so egregious as to exceed the boundaries of wrongful injury redressable under Chapter 536

RSMO state law proceedings, and without any doubt whatsoever, clearly are deprivations § 1983 is intended to redress.

5. The courts have held that 42 U.S.C. § 1983 does not create any substantive rights, but merely provides a remedy for plaintiff who have been deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States.[3]

6. Appellant/Plaintiff Rice has been deprived by a state government division or agency, of rights and privileges secured by the Constitution or laws of the United States. It was upon this basis that suit was filed in District Court along with state law claims because Appellees engaged in a course of injurious conduct including fraud, forgery, and defamation of members of Ms. Rice's immediate family including Plaintiff Hohlt, to conceal unlawful activity and initiate and manipulate the process ultimately resulting in deprivation of civil rights under 42 U.S.C. § 1983.

7. It has been further held that Courts must construe the coverage of § 1983 liberally, so that § 1983 achieves its goal of providing a remedy against all forms of official violation of federally protected rights.[4]

8. The goal of 42 U.S.C. § 1983 to provide a remedy against all forms of official violation of federally protected rights, in the case at bar, is rendered ineffectual by the arbitrary application of the Rooker-

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[3] **Eleventh Circuit:** Burch v. Apalachee Community Mental Health Services, Inc., 840 F2d 797 (11th Cir. Fla 1988) affd Zimermon v. Burch, 494 US 113, 110 S.Ct. 975, 108 L.Ed2d 100 (1990)

[4] **Supreme Court:** Dennis v. Higgins (US) 111 S.Ct. 865, 112 L.Ed2d 969 (1991)

Feldman and Colorado River abstention doctrines.

9. The goal of this appeal to the Supreme Court of the United States is to address an "unwarranted expansion of" the Rooker-Feldman and Colorado River "abstention doctrines to an unprecedented extent which effectively allows the invocation of these abstention doctrines whenever any state proceeding is ongoing, no matter how attenuated the state's interests are in that proceeding and no matter what abuses the federal plaintiff might be sustaining." (Para-phrasing Justice BLACKMUN, substituting Younger with Rooker-Feldman and Colorado River) (Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519,1534, 481 U.S. 1(U.S.N.Y. 1987). That Justice BLACKMUN, along with Justice BRENNAN and Justice STEVENS, put forth essentially the same opinion in Pennzoil Co. v. Texaco, Inc, **(supra)** , with respect to the abstention principles enunciated in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 760, 27 L.Ed.2d 669 (1971). "See Trainor v. Hernandez, 431 U.S. 434, 448, 97 S.Ct. 1911, 1920, 52 L.Ed.2d 486 (1977)(concurring opinion). In addition, for the reasons given by Justice BRENNAN, see supra, at 1531 (concurring in judgment), I believe that federal collateral review is not barred by the principles announced in District of Columbia Court 1535 of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923)." (quoting Justice BLACKMUN)

10. Appellees argued that the state case Evelyn E. Rice v. State of Missouri, Department of Social Services, Division of Legal Services, Division of Aging, CV 195-2927CC, was a lawsuit and the Rooker-Feldman and Colorado River abstention doctrines warranted the invocation of said abstention doctrines as rational for dismissal of Evelyn Rice And Robert Hohlt, No. 4:96CV00669 ERW. (hereinafter "Rice And Hohlt") The District

Court and the Court of Appeals accepted Appellees argument even though Appellants argued otherwise.

THE DISTRICT COURT WAS NOT ASK TO DECLARE ANY STATE COURT RULING WRONG OR INCORRECT NOR ASK TO RULE ON THE MERITS OF THE UNDERLYING ADMINISTRATIVE CLAIMS

11. As has been stated previously, the state proceeding Evelyn E. Rice supra, is not a lawsuit. It is a continuation of the administrative procedure process. It is not an independent action originating in the trial court. The Federal District Court has jurisdiction to review the decisions and actions of a state administrative agency. Charchenko v. City of Stillwater, 981 F. 3d 981. Also, Evelyn E. Rice is differentiated from Charchenko and Loudermill and Bonner. In Charchenko a state hearing was held, and in Loudermill a post-determination was held, and in Button the state court reached a determination on the merits. However, Evelyn E. Rice is differentiated from these cases in that no pre-determination hearing and/or no post-determination hearing and/or no hearing on the merits and/or no hearing whatsoever has been afforded. Also, Evelyn E. Rice is further differentiated in that no witnesses have been permitted to appear, no examination of any witnesses has been permitted, no competent evidence has been submitted, and representation by Mrs Rice's own attorney was not permitted by the administrative hearing officer.

In Charchenko the Court held:

> "The plaintiffs in Loudermill received a post-termination hearing. Whether plaintiff's failure to pursue available remedies after this hearing barred their federal section 1983 actions was the preliminary issue in Loudermill. Loudermill held that "'{t}he choice of whether to proceed in a state of federal forum, however, necessarily belongs to the plaintiffs and they

cannot be deprived of it by a state rule which gives preclusive effect to unappealed state administrative decisions.'" Id at 559 (quoting Moore v. Bonner, 695 F.2d 799, 801(4th Cir. 1982)('unappealed decision of state administrative agency not entitled to "full faith-and-credit dignity accorded state court decisions.'").

12. Ms. Rice has the right to choose the forum she wished to pursue the denial of her federal due process rights. The state administrative decision could not have a preclusive effect of keeping Ms. Rice from pursuing her claims of deprivation of federal due process rights in federal court. It does not matter whether Ms. Rice appealed the state administrative decision at the same time. Ms. Rice is not precluded from pursuing her remedies for violation of her due process rights in federal court. Moreover, the state administrative decision is not entitled to the full faith-and-credit dignity accorded state court decisions. Charchenko, supra. If Ms. Rice had not appealed the decision of the Division of Aging, she would have been precluded from pursing her state administrative claims. Ms. Rice cannot be forced to give up her state claims to pursue her federal due process claims.

The Defendants, by arguing that this federal cause is inextricably intertwined with the state Chapter 536.100 review proceeding are inasmuch arguing Mrs. Rice must either give up her federal claims to preserve and pursue her state claims, or give up her state claims to pursue her federal claims.

The original administrative agency decision of the Division of Aging ruled that Ms. Rice could not be granted any remedy because the issues were moot and she had no remedy for the deprivation of services she experienced. Therefore, the agency decision stands for the

proposition that the state has no jurisdiction over state law claims she is bringing because no relief can be granted, **even in cases where no hearing on the merits was held.** The court in Charchenko went on to state:

> "The divestment of state court jurisdiction does not effect the other alternative available; the federal forum. Accordingly, Rooker-Feldman does not bar Charchenko's Sec 1983 suit. Supra, P. 984."

13. Therefore, Ms. Rice's Section 1983 action is not barred under these principles regardless of the fact she appealed the administrative decision. Therefore, the Rooker-Feldman doctrine does not preclude the District Court in this case from determining whether Ms. Rice's due process rights were violated by the state. The state Chapter 536 RSMo review proceeding is not inextricably intertwined with the District Court case and the District Court should not have abstained from hearing Ms. Rice's federal due process claims. Additionally, the Social Security Act does not preclude a private civil rights action pursuant to 42 U.S.C.A. Section 1983 to compel a state agency to apply proper standards to initial disability determinations. Laird v Stilwell, (N.D. Iowa, 982 F. Supp 1345). Ms. Rice's federal due process claims were collateral to any claim for benefits she asserted in her state administrative appeal. Under the Eldridge test, claims that are collateral to any claim for benefits and where the harm imposed by exhaustion would be irreparable the exhaustion of administrative remedies requirement will be tolled. Bowen v. City of New York, 106 S.Ct. 2022, 2028. Ms. Rice meets these tests. Although Ms Rice asserted due process claims in the state administrative appeal, which she was entitled to do under Missouri administrative law, the

state court was not required to hear those claims and the state court did not hear those claims.

> "Thus the mere fact that Congress created parallel and perhaps duplicative avenues for review does not, standing alone, demonstrate an implicit purpose to impose an exhaustion requirement." Alacare, Inc.-North v. Baqqiano, 875 F.2d 963, 968.

Therefore, applying the same rational, neither should Ms. Rice be precluded from filing her private civil rights action pursuant to 42 U.S.C.A. Section 1983 to compel a state agency to apply proper standards to the termination of eligibility for benefits under Social Service Block Grant program of Title XX of the Social Security Act, regardless of whether she pursues state court appeal of the wrongful termination of eligibility for those benefits in state court. Ms. Rice has the right to have the federal District Court decide her federal due process claims.

III. WHETHER A STATE CIRCUIT COURT REVIEW OF A STATE ADMINISTRATIVE AGENCY ACTION IS A CONTINUATION OF THE ADMINISTRATIVE PROCEDURE AND NOT A "LAWSUIT"?

1. The District Court, in its Memorandum And Order of April 7, 1997, stated:

> "The Court concludes that the "unflagging obligation" to exercise its jurisdiction does not require permitting duplicative lawsuits." [at p 11]

and stated:

> "This Court cannot guess the principles under which the state court will determine the merits of her claim." [at p 5-6]

2. However, the District Court did not have to guess at the principles under which the merits of her appeal to circuit court would

be determined. Evelyn E. Rice v. State of Missouri, Department of Social Services, Division of Legal Services, Division of Aging, CV 195-2927CC, was an **appeal** of an administrative agency decision pursuant to chapters 536.100 through 536.140 RSMo, which statutes clearly define the scope of review required to determine the merits of her claim. That regardless of the caption, the action was merely a continuation of the administrative process and was not a "lawsuit" i.e., an action originating in circuit court.

3. Simply because the State Circuit Court Petition bears the caption Evelyn E. Rice v. State of Missouri, Department of Social Services, Division of Legal Services, Division of Aging, CV 195-2927CC, (hereafter "Evelyn E. Rice") does not mean it is a "lawsuit" i.e., an independent action originating in a trial court. The Missouri Court of Appeals and the Missouri Supreme Court case law supports our argument.

4. On the question of whether Evelyn E. Rice is a "lawsuit" per se, the District Court should have first identified the **standard** which the high courts of the State of Missouri apply to § 536.100 appeals of administrative agency actions to circuit courts in the State of Missouri, prior to determining whether Rooker-Feldman doctrine was applicable in the federal case. Without this first step, no valid determination could have been made going to the question of applicability of Rooker-Feldman doctrine regardless of language employed to justify abstention. In order to determine the **standard** which should have been applied, it is necessary to first examine the opinions of the Missouri Court of Appeals and the Missouri Supreme Court, and further examine the statutes under which jurisdiction was invoked in Evelyn E. Rice.

The Missouri Supreme Court stated:

> A petition for review under § 536.100

> is quite different from an independent action originating in the trial court in which the respective parties must necessarily possess the capacity to sue or be sued. Reifschneider v. Public Safety Commission, 766 S.W.2d 1 (S.Ct.1989)

5. Also necessary is a thorough reading of Missouri Revised Statutes §§ 536.100 through 536.140. This secondary step reveals the purpose of these statutes are to provide only a limited scope of review of administrative agency actions (i.e., the agency order and decision upon the whole record) upon which, procedurally, an aggrieved person is to appeal agency actions originating at the administrative level where no special statute exists to govern the subject administrative agency. A companion reading of Mrs Rice's state petition reveals she requested a scope of review entirely consistent with that required under Missouri Revised Statutes §§ 536.100 through 536.140.

6. Evelyn E. Rice supra, is an ongoing § 536.100 RSMo proceeding presently in the Missouri Court of Appeals. The action originated before an agency of the state and § 536.100 RSMo provides the legislatively defined mechanism for a continuation of the administrative case for the purpose of review of a state administrative agency action. Our argument is supported by and is consistent with Missouri Court of Appeals and Missouri Supreme Court case law, stated as follows.

> "[] it was correctly stated in Cass County that **"the action of the circuit court was a continuation of the case heard by the commissioners."** State ex rel. Cass County v. Dandurand, 759 S.W.2d 603 at 605 (Ct. App. 1998) (Quoting Reifschneider Id.)(emphasis added)

and

> "[] the parties to a review

proceedings under § 536.100 are determined by the record before the administrative agency rather than by caption []." (Quoting Williamsburg Truck Plaze v Muri, 857 S.W.2d 534 (Ct.App. 1993))

and

"In pertinent part, § 536.110.2 reads: "No summons shall issue in such case, but copies of the petition shall be delivered to the agency and to each party of record in the proceedings before the agency or to his attorney of record ***." From this language, it is apparent that the parties to the review proceedings, [], are designated, not by the composition of the review petition, but by the record made before the administrative agency. Exclusive of persons who may be permitted to intervene later on motion, the identity of the petitioners and respondents on review is already set before the petition for review is filed. [] The foregoing is not a new or recent concept in judicial review of administrative decisions. In State ex rel. Anderson Motor Service Co. v Public Service Commission, 339 Mo. 469, 476, 97 S.W.2d 116, 119 (1936), the court observed: "Under the Public Service Act, the circuit court exercises a jurisdiction in its nature derivative or appellate, rather than original." Lusk v Public Service Commission, 277 Mo. 264, 273, 210 S.W. 72, 75 [4-7]. For these reasons it appears to us not unreasonable that the statute should require, as we think it does, that the parties who appear before the commission and are interested in its orders and decisions [...] Indeed if no notice were given and the cause proceeded to a disposition affecting a property right

> of a party who had participated in the cause before the administrative body, due process rights would be infringed State ex rel. Monsey-Feager/Rouse-Waites v. McGuire, 510 S.W.2d 449, 452 (Mo. banc 1974) Notice, however, is a different matter from the command of a complaint and summons [...]. [...] **The action in the circuit court was a continuation of the case heard by the commissioners.**" (emphasis added) (omissions) (Quoting State ex rel. Cass County v Dandurand, 759 S.W.2d 603)

Since Missouri's high courts have ruled that the subject state law proceedings is merely a continuation of the administrative case, it cannot also be a lawsuit.

Therefore, the rational for applying the Rooker-Feldman doctrine is not applicable because an administrative case is not a lawsuit. Whether Evelyn Rice supra, is a lawsuit is not a federal question, but a question of state law and which the Defendants admit. (See Appellees Brief at p 31) "The source of governing law is state law {...}." State law determines how the state case is characterized. Quite simply, Evelyn Rice supra, did not originate in state circuit court and state circuit court was not the trial court. That Evelyn Rice supra, originated at the state administrative level where rightly or wrongly, **no notice and no hearing was afforded.**

Therefore, because Chapter 536 RSMo proceedings are not independent actions originating in trial court with all attendant rights thereof, the District Court should not have ruled that Evelyn E. Rice supra, was a separate lawsuit, nor ruled that Rooker-Feldman and Colorado River doctrines applied.

The Court of Appeals should have reversed the District Court. We can only presume that the District court, likewise the Eighth Circuit Court of Appeals, did not believe Appellants' arguments concerning the law

and/or did not examine the statutes involved to see for themselves that: (i) §§ 536.100 through 536.140 RSMo offers only limited remedies; (ii) and was the state's legislatively defined procedure to follow when no other statute specific to the agency involved was available; (iii) and that § 208.080 RSMo was applicable specifically to Division of Family Service (iv) and makes no mention of Division of Aging.

THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS AND THE EIGHTH CIRCUIT SANCTIONED SUCH DEPARTURE

The District Court in their analysis of the Plaintiffs Amended Complaint failed to distinguish in a meaningful way, between the two Plaintiffs in the federal case and the separate plaintiffs in the three separate state cases where two of the plaintiffs in two of the state cases were marginally, if at all related to the two plaintiffs and the issues in the federal case. The District Court also failed to examine and distinguish between the remedies available under the state Chapter 536 RSMo proceeding versus a Section 1983 action. The District Court also failed to distinguish between the counts of the Complaint. The District Court should have done an analysis of each Plaintiffs' claims so that each claim could be rationally differentiated. The Eighth Circuit also failed to analyze each count of Appellants' Amended Complaint and each of the Appellants' claims separately further adding to the prejudice to the Appellants from the entire Amended Complaint being dismissed.

The District Court had no rational and balanced justification for applying the Rooker-Feldman doctrine or the Colorado River doctrine. Likewise, the Eighth Circuit Court of Appeals had no rational and balanced justification for affirming the District Court Judgment. The District Court's dismissal of the entire Amended Complaint greatly prejudiced the Appellants and should

have been reversed by the Eighth Circuit.

CONCLUSION

In a nutshell, the Eighth Circuit's ruling stands for the proposition that if an aggrieved citizen merely appeals an agency decision under their state's prescribed avenue of redress, that citizen is barred from a concurrent § 1983 action even if the doctrine of res judicata and estoppel would mean that an unfavorable state court opinion would have issue preclusive effects that would bar the party(ies) from relitigating his or her claims in federal court --- eviscerating the supplemental nature of Section 1983.

WHEREFORE, Appellants respectfully submit that the Petition for a writ of certiorari should be granted.

Respectfully submitted,

Susan M. Settle

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Date: June 24, 1998

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAN 28 1998

No.97-2446EMSL

Evelyn E. Rice,
et al,

Appellants,

v .

Order Denying Petition for Rehearing and Suggestion for Reheating En Banc

Lesley Borovicka,
et al,

Appellees.

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 27, 1998

Order Entered at the Direction of the Court:

s/ Michael E. Gains

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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PC - PARTIES
FEB 18 1998
U. S DISTRICT
EASTERN DISTRICT OF MO
ST LOUIS

No. 97-2446EMSL

Evelyn E. Rice; Robert Hohlt,

Appellants,
v.

Appeal from the United States District Court for the Eastern District of Missouri

Lesley Borovicka; Cheryl Holland, Katie Broyles; Ann Deaton; Complete Health Care, Inc.; Shirley Harrison; Mark Anderson; Diane Webb; Kathie Godsey; Gregory A. Vadner, Director, Division Of Aging

Appellees.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the patties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

December 18, 1997

A true copy.

ATTEST: S/ Michael E. Gains

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-2446

Evelyn E. Rice; Robert Hohlt,

Appellants,

v.

Lesley Borovicka; Cheryl Holland, Katie Broyles; Ann Deaton; Complete Health Care, Inc.; Shirley Harrison; Mark Anderson; Diane Webb; Kathie Godsey; Gregory A. Vadner, Director, Division Of Aging

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

[UNPUBLISHED]

Submitted: December 12, 1997
Filed: December 18, 1997

Before BOWMAN, WOLLMAN, and LOKEN, Circuit Judges.

PER CURIAM.

Plaintiffs appeal from a final order entered by the District Court[1] dismissing their complaint. For reversal, plaintiffs argue principally that the court misapplied the

[1] The Honorable E. Richard Webber, United States District Judge for the Eastern District of Missouri.

Rooker-Feldman doctrine and the Colorado River abstention doctrine. Having reviewed the case, we conclude the District Court committed no error of law, nor did it abuse its discretion. For the reasons stated in the District Court's memorandum and order, we affirm. See 8th Cir. R. 47B.

A true copy -

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED
1997
US DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS

EVELYN RICE,
and ROBERT HOHLT
Plaintiffs,

Vs.

No.4:96CV00669 ERW

LESLEY BOROVICKA, CHERYL HOLLAND, KATIE BROYLES, ANNE DEATON, SHIRLEY HARRISON, DIANE WEBB, KATHY GODSEY, MARK ANDERSON, GREGORY VADNER, and COMPLETE HEALTH CARE, INC., Defendants.

MEMORANDUM AND ORDER

This matter is before the Court upon defendants Holland, Cowell, Deaton, and Broyles, motion to dismiss (document #141, plaintiffs, motion for leave to amend count XIV [document #371, and a litany of other motions.

Plaintiffs bring a fourteen count complaint against defendants, dividing defendants into seven. groups across the counts. Jurisdiction in this Court is based on plaintiff Rice's allegation that her rights under 42 U.S.C. § 1983 were violated when personal services provided to her by the State of Missouri's Division of Aging under a Social Security Block Grant were interfered with and discontinued without a proper hearing or appeal. In Counts II, III, IV, and XIV, she claims these alleged actions constituted a violation of her due process rights. The remaining counts are state law tort claims.

Plaintiff Evelyn Rice received in-home health care services through a federally funded block grant program administered by the Division of Aging (Division) . The Division contracted out the service through approved private providers, in this case defendant Complete Health Care, Inc. (Complete). The services were provided by Complete to Rice at her home. Plaintiff Hohlt is Rice's son and lives with her, as well as having power of attorney for her. Allegations were made

that Hohlt struck a health care provider during a visit to care for Rice. Hohlt in turn alleged that a health care provider attempted to defraud the state with false invoices for services not performed for Rice.

Rice's in-home services were stopped, and the Division began an investigation of the allegations of assault and fraud. Rice alleges that her in-home services didn't resume for seven months. Rice claims her due process rights were violated when her services were stopped prior to the investigation, and that services should have been continued until the investigation was complete and decision was announced. Furthermore, she alleges Division employees failed to advise her of her right to appeal the decision to stop her in-home services. In her second amendment to Count XIV, She alleges that defendant Vadner is liable for the same violations for his personal involvement as the Director of the Division of Aging. Rice also claims that defendant Complete conspired with the Division employee defendants in making defamatory statements to deny her due process rights and terminate her in-home services.

Defendants move to dismiss the complaint because of three state court cases involving many of the same defendants and surrounding the same circumstances of the instant action. Plaintiffs admit that the other actions are all pending, although at various stages from pre-trial to appeal, but claims that because the parties and the issues are not identical to those in the instant case, the cases are not duplicative.

Plaintiff Rice has a pending action filed in the Circuit Court of St. Charles County, Division Two, **Evelyn E. Rice v. State of Missouri. Department of Social Services. Division of Legal Services, Division of Aging,** CV 195-2927CC. In that case, Rice alleges that the Division of Aging failed to provide plaintiff with an evidentiary hearing to contest the decision to discontinue her benefits. Rice claims the Division made a decision regarding her benefits without regard to her due process rights. She also asks the St. Charles County Circuit Court to determine if the Division's actions are in violation of constitutional provisions.

Plaintiff Hohlt's son, Dustin Hohlt, filed suit against defendant Complete in the Circuit Court of St. Charles County, Division Two, **Dustin Robert Hohlt v. Complete Health Care Inc., Kathie M. Godsey,** CV195-2265CC. In that case, plaintiff Dustin Hohlt sues for defamation and slander arising out of the delivery of in-home benefits delivered to Plaintiff Rice. Plaintiff Hohlt's daughter, Wendy N. Huddleston, is also suing the same parties for defamation and slander based upon the same statements. **W.H.H. V. Complete Health Care Inc. and Kathie M. Godsey,** CV196-1347CC. On December 8, 1995, Dustin Hohlt's case was dismissed at the trial level because the judge found the statements made by the health care workers in their reports to be absolutely privileged. The dismissal is apparently being appealed.

Defendants move to dismiss plaintiffs, claims as barred by the **Rooker-Feldman** doctrine, which presents a jurisdictional bar to general constitutional challenges brought in federal court that are inextricably intertwined with claims asserted in state court. **Charchenko v. City of Stillwater,** 47 F.3d 981, 983 (8th Cir.1995); **District of Columbia Court of Appeals v Feldman**, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); **Rooker v. Fidelity Trust Co.**, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923).

Here, plaintiff Rice is challenging the alleged denial of her benefits by using 42 U.S.C. § 1983 as a platform for her due process constitutional claims. **Rooker-Feldman**, however, proscribes federal appellate review of state court proceedings, and cases interpreting the doctrine make it clear that a litigant cannot circumvent **Rooker-Feldman** by recasting his or her lawsuit as a § 1983 action. **Keene Corp. v. Cass,** 908 F.2d 293, 297 (8th Cir. 1990). Therefore, Rice's § 1983 claims are barred by **Rooker-Feldman** if they are inextricably intertwined with the constitutional claims she is prosecuting in state court.

In order for this Court to determine whether Rice's claims are "inextricably intertwined" with the state court claims, the Court must analyze whether the relief requested in the federal action would effectively reverse the state court decision or void its ruling. Id. at 296-97.

Currently, Rice is asking the state court to analyze the procedures afforded her against the requirements of Missouri law and the due process clause. It is not clear that she is asking for relief exclusively under a state constitutional due process principle not included in federal due process jurisprudence. This Court cannot guess the principles under which the state court will determine the merits of her claim. if the state court determines that Rice's due process rights were not violated, and this Court heard Rice's § 1983 claims, it could apply the same law, and if it granted Rice relief, the order would amount to a reversal of the state court. "Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment." **Pennzoil Co. v. Texaco Inc.,** 481 U.S. 1, 25 (1987) (Marshall, J., concurring). The **Rooker-Feldman** doctrine is "broader than claim and issue preclusion because it does not depend on a final judgment on the merits. **Charchenko,** 47 F.3d at 983. **Rooker-Feldman** is concerned with ensuring that litigants do not take multiple bites from the same apple. **In re Goetzman,** 91 F.3d 1173, 1177 (8th Cir. 1996).

On the defamation claims of Rice and Hohlt, a previous state court case has been dismissed and is now on appeal alleging defamation in the same context. Although the Court only has supplemental jurisdiction over these state law claims under 28 U.S.C. § 1367, the Court believes the principles of **Rooker-Feldman** prevent it from hearing these defamation claims. While neither plaintiff in this case is a party to the two state court defamation cases, a finding by this Court that statements or written reports made during the delivery of or concerning in-home services provided to Rice are defamatory would clearly and impermissibly circumvent the state court determination of absolute privilege.

For the principles outlined above, the Court holds that Rice's § 1983 claims and all accompanying defamation claims are jurisdictionally barred. This Court does not have the power to review state court decisions and plaintiffs are not permitted multiple chances at

recovery for the same cause of action.

Additionally, to the extent plaintiffs assert supplemental state law claims, the Court declines to exercise supplemental jurisdiction over the same. Under 28 U.S.C. § 1367(c) (3), district courts may decline jurisdiction over state claims as a "matter of discretion." Hassett v. Lemay Bank and Trust Co., 851 F.2d 1127, 1130 (8th Cir. 1988). Further, when state law claims are included in the complaint and "the federal claims are dismissed before trial the state claims should be dismissed as well." United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). Therefore, this Court declines jurisdiction over any state law claims. Without jurisdiction over the federal claims this Court lacks supplemental jurisdiction to hear the remaining state law claims, which plaintiffs admit predominate the complaint.

Alternatively, defendants ask this Court to dismiss under the Colorado River abstention doctrine because of the pendency of Evelyn E. Rice v. State of Missouri. Department of Social Services, Division of Legal Services. Division of Aging, CV 195-2927CC.

In Colorado River Water Conservation Dist, v. U.S., 424 U.S. 800, 817 (1976), the Supreme Court identified several factors the courts must consider in deciding whether to dismiss an action based upon a concurrent state-court action. Defendant argues that consideration of these factors weighs in favor of dismissal.

The Supreme Court held in Colorado River that "a federal district court may stay or dismiss an action solely because of the pendency of similar litigation in state court." Gulfstream Aerospace Corp. v. Mayacamas Corp-., 485 U.S. 271, 273 (1988). The Court further instructed that, even where the facts of a case do not fall within any of the three traditional abstention scenarios, considerations of (w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" may counsel in favor of dismissal. Colorado River, 424 U.S. at- 817. Finally, the Court outlined several factors the courts may consider in making their determination of whether the "exceptional" circumstances contemplated in Colorado River exist.

In determining whether to abstain under Colorado River, courts must consider the following six factors: (1) whether there is a res over which one forum has established - jurisdiction, (2) the inconvenience of the federal forum, (3) whether maintaining separate actions may result in piecemeal litigation, (4) whether the state or federal court first obtained jurisdiction, (5) whether state or federal law controls, and (6) the adequacy of the state forum to protect the plaintiff's rights. Employers Ins, of Wausau y. Missouri Elec. Works. Inc., 23 F.3d 1372, 1375 (8th Cir. 1994); see also Moses H. Cone Memorial Hosp, v. Mercury Constr. Corp., 460 U.S. 1, 23-27 (1983) (adding factors 5 and 6 to the four-part Colorado River analysis). No one factor is necessarily determinative, and the balance of factors is weighted in favor of the exercise of jurisdiction. Moses H. Cone. 460 U.S. at 16; Colorado River, 424 U.S. at 818-19. In making its decision, a court must take into account "both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise." Id.

The Court must also determine whether the state case and this case are parallel. Globe Indem. Co. v. Wrenn Ins, Agency of Missouri, 816 F. Supp. 1379, 1382 (W.D. Mo. 1993). Two suits are deemed to be parallel "when substantially the same parties are contemporaneously litigating substantially the same issues in another forum." Caminiti and Iatarola. Ltd. v. Behnke warehousing, Inc., 962 F. 2d 698, 700 (7th Cir. 1992) (citations omitted) ; see also Republic Bank Dallas Nat'l. Ass'n v. Macintosh, 828 F.2d 1120, 1121 (5th Cir. 1987)(quoting PPG Indus., Inc, y. Continental Oil Co., 478 F.2d 674, 682 (5th Cir. 1973) (parallel actions involve the same parties and the same issues)).

The Court finds that the actions are parallel, noting that in state court plaintiff Rice is challenging the due process afforded her by defendant Division. The alleged due process rights are outlined in the state laws governing the benefits she was receiving. See Mo. Rev. Stat. § 208.080. The decision by the state court of whether the Division complied with the state statute will be determinative. The Court agrees with defendants that a decision on this state

statute could result in piecemeal litigation, and further may act to provide the state court an advisory opinion, something this Court will not do and something that the state court does not need. Particularly persuasive are the facts that in this case, the state court action was filed long before the instant action, that both actions concern the same disruption of benefits, and that identical factual issues exist.
The Court concludes that the "unflagging obligation" to exercise its jurisdiction does not require permitting duplicative lawsuits.
Accordingly, after careful consideration of the issues and for the reasons stated above,

IT IS HEREBY ORDERED that plaintiffs, motion for leave to amend count XIV [document #371 is **GRANTED.**

IT IS FURTHER ORDERED that defendants, motion to dismiss [document #141 is **GRANTED.**

IT IS FURTHER ORDERED that defendants, various motions to dismiss [documents #6, #17, #18, #21, #22, #31, #36,1 are **DENIED** as moot.

IT IS FURTHER ORDERED that plaintiffs motions to compel [documents #38 and #391 are **DENIED** as moot.

IT IS FURTHER ORDERED that plaintiffs motions for sanctions [documents #38 and #321 are **DENIED** as moot.

Dated this 7th Day of April, 1997

s/ E. Richard Webber
E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EVELYN RICE, and
ROBERT HOHLT,

Plaintiffs,

Vs. No.4:96CV00669ERW

LESLEY BOROVICKA, CHERYL
HOLLAND, KATIE BROYLES,
ANNE DEATON, SHIRLEY HARRISON,
DIANE WEBB, KATHY GODSEY,
MARK ANDERSON, GREGORY VADNER,
and COMPLETE HEALTH CARE, INC.,

Defendants.

ORDER OF DISMISSAL

In accordance with the Memorandum and order filed this day and incorporated herein, **IT IS HEREBY ORDERED** that plaintiffs' complaint is **DISMISSED** in its entirety. Plaintiffs' claims against all defendants are dismissed without prejudice.

Dated this 7th Day of April, 1997.

s/ E. Richard Webber
E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT,
DIVISION FIVE

DUSTIN ROBERT HOHLT,

Plaintiff/Appellant,

v.

COMPLETE HEALTH CARE, INC.,
and
KATHIE GODSEY

Defendants/Respondents.

No. 69847

Appeal from the Circuit Court of St. Charles County. Honorable Donald E. Dalton.

Opinion Filed:
December 17, 1996,

The plaintiff filed a libel suit against Complete Health Care, Inc., a health service provider, and Kathie Godsey, one of its employees. The petition charged that Health Care's employees, in reports to the Division of Aging of the Missouri Department of Social Services, made false, defamatory and malicious statements of and concerning the plaintiff. The defendants moved to dismiss the petition for failure to state a cause of action, alleging that the statements were contained in reports required to be made to the Division of Aging, and that they were "absolutely privileged." The trial court sustained the motion to dismiss and entered judgment for the defendants. This appeal followed. The questioned statements read as follows:

> I have also heard Bob & his 21 yr. old daughter state that the daughter is pregnant for the 2nd time [sic] her brother's child (Dustin)
>
> I have also heard Bob & his son Dustin call Mrs. Rice "Crazy" and "Stupid."

"The aide arrived to find Mrs. R. on the floor- she had not been hurt. She told the aide that her grandson locks her in the room and hits her."

"The aide told me that she was afraid of him and Mrs. Rice had told her that they beat her. The aide ask who they are and she said her son and grandson."

The petition charges that the first two statements just quoted were reported by defendant Godsey, and the last two by other, unknown employees of Health Care, in the course of their employment. It also states that the grandson referred to is the plaintiff. See Rule 55.20.

The first, third, and fourth statements are defamatory in the sense of the law because they charge that the plaintiff was guilty of criminal offenses (incest in the first, and assault in some degree in the third and fourth.) The second statement contains insulting and discourteous language, but it is not legally defamatory. Morton v. Hearst Corp., 779 S.W.2d 268 (Mo. App. 1989).

Thus, the plaintiff is entitled to a jury trial unless the petition shows on its face that the statements were privileged. The trial court had only the petition before it, and so there is no question of treating the motion to dismiss as a motion for summary judgment.

The defendants argue that there is an absolute privilege, asserting that the statements were required to be made to a quasi-judicial agency. They cite Barchers v. Missouri Pacific R.R. Co., 669 S.W.2d 235 (Mo. App. 1984), finding absolute privilege in an exhibit introduced in a hearing before a Public Law Board established pursuant to the Railway Labor Act, and Remington v. Wal-Mart Stores, Inc., 817 S.W.2d 571 (Mo. App. 1991), finding absolute privilege in an employer's letter of protest to the Division of Employment Security objecting to the award of unemployment compensation to the plaintiff, They assert that the Division of Aging is an administrative tribunal and that the absolute privilege is established by the common law because Health Care had a

duty to make the reports in question pursuant to section 565.188. 1, RSMo. 1994. The pertinent portions of that statute read as follows:

> When any physician ... clinical personnel engaged in examination, care or treatment of persons, or other health practitioners ... or other person with responsibility for the care of a person sixty years of age or older has reasonable cause to suspect that such person has been subjected to abuse or neglect or observes such a person being subjected to conditions or circumstances which would reasonably result in abuse or neglect, he shall immediately report or cause a report to be made to the department.....

Subsection 2 of the same statute makes failure to report a misdemeanor, and Subsection 3 provides that the making of a false report is a Class A misdemeanor. Section 565.190, RSMo. 1994, provides as follows:

> Any person, official or institution complying with the provisions of section 565.188 in the making of a report, or in cooperating with the department in any of its activities pursuant to sections 565.186 and 565.188 ... *shall be immune from any civil or criminal liability for making such a report ... unless such person acted negligently, recklessly, in bad faith, or with malicious purpose.* (emphasis added).

This statement of immunity defines a qualified privilege, rather than an absolute privilege. Henry v. Halliburton, 690 S.W.2d 775, 781 (Mo. banc 1985); Ramacciotti v. Zinn, 550 . S.W.2d 217, 224 (Mo. App. 1977). These cases point out that the concept of absolute privilege is rarely applied, and that a plaintiff may still prevail in most privilege situations if it can be shown that the person publishing false defamatory statements acted with malice. The statute just quoted, indeed, goes beyond the traditional definition of absolute privilege in denying the privilege to statements which are negligently made.

The defendants give attention to the statutory language, but argue that they rely on the common law rather than on the statute. The statute providing the duty to report, however, defines a privilege which is qualified rather than absolute, and it is reasonable to conclude that the legislature, in defining the privilege conferred, intended that no other privilege apply. We are inclined to question the defendants' assertion that either the Department of Social Services or the Department of Aging is an administrative tribunal, but need not decide the point because the statute expressly delimits the privilege which is recognized.

The plaintiff therefore, may prevail if he pleads and proves malice or the equivalent as recognized by section 565.190. Under Rule 55.15, malice may be averred generally. It is charged that the statements set out in the petition were never made and that the employees of Health Care acted "willfully, wantonly, and maliciously" in reporting the statements. The petition adequately pleads the exception to the statutory language.

We hold simply that the plaintiff is entitled to a jury trial on the issues raised by the petition. We do not hold that the plaintiff has made a case for the jury. The burden of proving malice is on the plaintiff, and he must do so by evidence. He does not make a case simply by showing that employees of the corporate defendant made the reports in question and that the reports contain false statements. The materiality of the statement may be important in determining malice. The trial court, at the close of the plaintiffs case, and at the close of all the evidence, must decide whether a case for the jury has been made.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

s/ Charles B. Blackmar
Charles B. Blackmar, Senior Judge

Clifford H. Ahrens, C.J. and William H. Crandall, Jr., J.:
CONCUR

BEFORE THE
DIRECTOR MISSOURI STATE DIVISION AGING
DECISION AND ORDER

In Re: Evelyn Rice
19 North Lang Drive
O'Fallon, MO 63366

Case No.: 500-24-6497

Hearing No.: DOA-60007

ORDER OF DISMISSAL

On or about March 3, 1994 the Division of Aging (hereafter Agency) notified Robert Hohlt, guardian for his mother Evelyn Rice, (hereafter Claimant) that the personal care services which Claimant had been receiving were terminated based on Agency allegations that Robert Hohlt physically attacked a personal care aide while she was rendering services to Claimant. On or about March 12, 1995 Mr. Hohlt requested an administrative hearing on behalf of Claimant to contest the termination of Claimant's personal care services. During the discovery phase of the contested case, the Agency conducted a full investigation of the alleged issues that gave rise to the termination of personal care services.

The findings of the investigation revealed no evidence that Mr. Hohlt had assaulted a personal care service provider. As a result of the findings of the investigation the Agency reinstated the Claimant for personal care services in October 1994.

Personal care services were not provided for the period of time from termination to reinstatement, and the Agency's basis for discontinuance of services was found to be unsubstantiated.

A telephone conference was held on March 8, 1995 regarding the status of the case, and Robert Hohlt was given until March 29, 1995 to submit any memorandum regarding what issues remained unresolved by the Administrative Hearing Unit. The Administrative Hearing Unit was advised on March 24, 1995, that Claimant had retained counsel (no entry of appearance has been received) and therefore the deadline for submitting memorandum was extended to March 31, 1995. No memorandum has been received by Claimant or Claimant's counsel.

No adequate remedy is available to the Administrative Hearing Unit to indemnify Claimant for the period of time in which she did not receive personal care services. The issue, however, before the Administrative Hearing Unit, termination of personal care services, is hereby now mute since these services have been reinstated.

IT IS HEREBY ORDERED that this case is dismissed.

Given at the City of Jefferson, State of Missouri, this 11th day of April, 1995.

s/ Russ Swanigan
Russ Swanigan
Hearing Officer

42 U.S.C. § 1983
Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress, except in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Chapter 536.100 RSMo
Party aggrieved entitled to judicial review.–
Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in sections 536.100 to 536.140, unless some other provision for judicial review is provided by statute; provided, however, that nothing in this chapter contained shall prevent any person from attacking any void order of an agency at any time or in any manner that would be proper in the absence of this section. Unreasonable delay on the part of any agency in deciding any contested case shall be grounds for an order of the court either compelling action by the agency or removing the case to the court for decision. (L. 1945 p. 1504 10)

Chapter 536.110 RSMo
Petition, when filed–process–venue.–
1. Proceedings for review may be instituted by filing a

petition in the circuit court of the county of proper venue within thirty days after the mailing or delivery of the notice of the agency's final decision.

2. Such petition may be filed without first seeking a rehearing, but in cases where agencies have authority to entertain motions for rehearing and such a motion is duly filed, the thirty-day period aforesaid shall run from the date of the delivery or mailing of notice of the agency's decision on such motion. No summons shall issue in such case, but copies of the petition shall be delivered to the agency and to each party of record in the proceedings before the agency or to his attorney of record, or shall be mailed to the agency and to such party or his said attorney by registered mail, and proof of such delivery or mailing shall be filed in the case.

3. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence or if any plaintiff is a corporation, domestic or foreign, having a registered office or business office in this state, in the county of such registered office or business office. The court in its discretion may permit other interested persons to intervene.

(L. 1945 p. 1504 10, A.L. 1953 p. 679, A.L. 1978 H.B. 1634) Effective 1-2-79

Chapter 536.120 RSMo

Suspension of decisions or orders.--

Pending the filing and final disposition of proceedings for review under sections 536.100 to 536.140, the agency may stay the enforcement of its order and may temporarily grant or extend relief denied or withheld. Any court in which such proceedings for review may be pending may issue all necessary and appropriate process to stay or require the agency to stay the enforcement of its order or temporarily to grant or extend or require the agency temporarily to grant or extend relief denied or withheld, pending the final disposition of such proceedings for

review. Such stay or other temporary relief by a reviewing court may be conditioned upon such terms as shall appear to the court to be proper. No such stay or temporary relief shall be granted by a reviewing court without notice, except in cases of threatened irreparable injury; and when in any case a stay or other temporary relief is granted without notice the court shall then make an order, of which due notice shall be given, setting the matter down for hearing as promptly as possible on the question whether such stay or other temporary relief shall be continued in effect. No such stay or other temporary relief shall be granted or continued unless the court is satisfied that the public interest will not be prejudiced thereby. (L. 1945 p. 1504 10)

Chapter 536.130 RSMo
Record on judicial review.–

1. Within thirty days after the filing of the petition or within such further time as the court may allow, the record before the agency shall be filed in the reviewing court. Such record shall consist of any one of the following:

(1) Such parts of the record, proceedings and evidence before the agency as the parties by written stipulation may agree upon;

(2) An agreed statement of the case, agreed to by all parties and approved as correct by the agency;

(3) A complete transcript of the entire record, proceedings and evidence before the agency. Evidence may be stated in either question and answer or narrative form. Documents may be abridged by omitting irrelevant and formal parts thereof. Any matter not essential to the decision of the questions presented by the petition may be omitted. The decision, order and findings of fact and conclusions of law shall in every case be included.

2. The record filed in the reviewing court shall be properly certified by the agency, and shall be typewritten, mimeographed, printed, or otherwise suitably reproduced.

In any case where papers, documents or exhibits are to be made a part of the record in the reviewing court, the originals of all or any part thereof, or photostatic or other copies which may have been substituted therefor, may, if the agency permits, be sent to the reviewing court instead of having the same copied into the record.

3. In any case where any party fails or refuses to agree to the correctness of a record, the agency shall decide as to its correctness and certify the record accordingly. If any party shall be put to additional expense by reason of the failure of another party to agree to a proper shortening of the record, the court may tax the amount of such additional expense against the offending party as costs.

4. The record to be filed in the reviewing court shall be filed by the plaintiff, or at the request of the plaintiff shall be transmitted by the agency directly to the clerk of the reviewing court and by him filed; provided, that when original documents are to be sent to the reviewing court they shall be transmitted by the agency directly, as aforesaid. The court may require or permit subsequent corrections of or additions to the record.
(L. 1945 p. 1504 10)

Chapter 536.140 RSMo
Scope of judicial review--judgment--appeals.

1. The court shall hear the case without a jury and, except as otherwise provided in subsection 4, shall hear it upon the petition and record filed as aforesaid.

2. The inquiry may extend to a determination of whether the action of the agency

(1) Is in violation of constitutional provisions;

(2) Is in excess of the statutory authority or jurisdiction of the agency;

(3) Is unsupported by competent and substantial evidence upon the whole record;

(4) Is, for any other reason, unauthorized by law;

(5) Is made upon unlawful procedure or without a fair

trial;

(6) Is arbitrary, capricious or unreasonable;

(7) Involves an abuse of discretion. The scope of judicial review in all contested cases, whether or not subject to judicial review pursuant to sections 536.100 to 536.140, and in all cases in which judicial review of decisions of administrative officers or bodies, whether state or local, is now or may hereafter be provided by law, shall in all cases be at least as broad as the scope of judicial review provided for in this subsection; provided, however, that nothing herein contained shall in any way change or affect the provisions of sections 311.690 and 311.700, RSMo.

3. Whenever the action of the agency being reviewed does not involve the exercise by the agency of administrative discretion in the light of the facts, but involves only the application by the agency of the law to the facts, the court may weigh the evidence for itself and determine the facts accordingly. The law applied by the agency as aforesaid may include the agency's own rules. In making such determination the court shall give due weight to the opportunity of the agency to observe the witnesses, and to the expertness and experience of the particular agency.

4. Wherever under subsection 3 or otherwise the court is entitled to weigh the evidence and determine the facts for itself, the court may hear and consider additional evidence if the court finds that such evidence in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the agency. Wherever the court is not entitled to weigh the evidence and determine the facts for itself, if the court finds that there is competent and material evidence which, in the exercise of reasonable diligence, could not have been produced or was improperly excluded at the hearing before the agency, the court may remand the case to the agency with directions to reconsider the same in the light of such evidence. The court may in any case hear and consider

evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record.

5. The court shall render judgment affirming, reversing, or modifying the agency's order, and may order the reconsideration of the case in the light of the court's opinion and judgment, and may order the agency to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in the agency.

6. Appeals may be taken from the judgment of the court as in other civil cases.
(L. 1945 p. 1504 10, A.L. 1953 p. 679)

Chapter 208.080
Appeal to director of the division of family services, when--procedure.--

1. Any applicant for or recipient of benefits or services provided by law by the division of family services may appeal to the director of the division of family services from a decision of a county office of the division of family services in any of the following cases:

(1) If his right to make application for any such benefits or services is denied; or

(2) If his application is disallowed in whole or in part, or is not acted upon within a reasonable time after it is filed; or

(3) If it is proposed to cancel or modify benefits or services; or

(4) If he is adversely affected by any determination of a county office of the division of family services in its administration of the programs administered by it; or

(5) If a determination is made pursuant to subsection 2 of section 208.180 that payment of benefits on behalf of a dependent child shall not be made to the relative with whom he lives.

2. If the division proposes to terminate or modify the payment of benefits or the providing of services to the

recipient or the division has terminated or modified the payment of benefits or providing of services to the recipient and the recipient appeals, the decision of the director as to the eligibility of the recipient at the time such action was proposed or taken shall be based on the facts shown by the evidence presented at the hearing of the appeal to have existed at the time such action to terminate or modify was proposed or was taken.

3. In the case of a proposed action by the county office of the division of family services to reduce, modify, or discontinue benefits or services to a recipient, the recipient of such benefits or services shall have ten days from the date of the mailing of notice of the proposed action to reduce, modify, or discontinue benefits or services within which to request an appeal to the director of the division of family services. In the notice to the recipient of such proposed action, the county office of the division of family services shall notify the recipient of all his rights of appeal under this section. Proper blank forms for appeal to the director of the division of family services shall be furnished by the county office to any aggrieved recipient. Every such appeal to the director of the division of family services shall be transmitted by the county office to the director of the division of family services immediately upon the same being filed with the county office. If an appeal is requested, benefits or services shall continue undiminished or unchanged until such appeal is heard and a decision has been rendered thereon, except that in an aid to families with dependent children case the recipient may request that benefits or services not be continued undiminished or unchanged during the appeal.

4. When a case has been closed or modified and no appeal was requested prior to closing or modification, the recipient shall have ninety days from the date of closing or modification to request an appeal to the director of the division of family services. Each recipient who has not requested an appeal prior to the closing or modification of his case shall be notified at the time of such closing or

modification of his right to request an appeal during this ninety-day period. Proper blank forms for requesting an appeal to the director of the division of family services shall be furnished by the county office to any aggrieved applicant. Every such request made in any manner for an appeal to the director of the division of family services shall be transmitted by the county office to the director of the division of family services immediately upon the same being filed with the county office. If an appeal is requested in the ninety-day period subsequent to the closing or modification, benefits or services shall not be continued at their prior level during the pendency of the appeal.

5. In the case of a rejection of an application for benefits or services, the aggrieved applicant shall have ninety days from the date of the notice of the action in which to request an appeal to the director of the division of family services. In the rejection notice the applicant for benefits or services shall be notified of all of his rights of appeal under this section. Proper blank forms for requesting an appeal to the director of the division of family services shall be furnished by the county office to any aggrieved applicant. Any such request made in any manner for an appeal shall be transmitted by the county office to the director of the division of family services, immediately upon the same being filed with the county office.

6. If the division has rejected an application for benefits or services and the applicant appeals, the decision of the director as to the eligibility of the applicant at the time such rejection was made shall be based upon the facts shown by the evidence presented at the hearing of the appeal to have existed at the time the rejection was made.

7. The director of the division of family services shall give the applicant for benefits or services or the recipient of benefits or services reasonable notice of, and an opportunity for, a fair hearing in the county of his residence at the time the adverse action was taken. The hearing shall be conducted by the director of the division of family

services or his designee. Every applicant or recipient, on appeal to the director of the division of family services, shall be entitled to be present at the hearing, in person and by attorney or representative, and shall be entitled to introduce into the record of such hearing any and all evidence, by witnesses or otherwise, pertinent to such applicant's or recipient's eligibility between the time he applied for benefits or services and the time the application was denied or the benefits or services were terminated or modified, and all such evidence shall be taken down, preserved, and shall become a part of the applicant's or recipient's appeal record. Upon the record so made, the director of the division of family services shall determine all questions presented by the appeal, and shall make such decision as to the granting of benefits or services as in his opinion is justified and is in conformity with the provisions of the law. The director shall clearly state the reasons for his decision and shall include a statement of findings of fact and conclusions of law pertinent to the questions in issue.

8. All appeal requests may initially be made orally or in any written form, but all such requests shall be transcribed on forms furnished by the division of family services and signed by the aggrieved applicant or recipient or his representative prior to the commencement of the hearing. (RSMo 1939 9411, A. 1949 S.B. 1063, A.L. 1951 p. 772, A.L. 1969 H.B. 804, A.L. 1981 S.B. 73, A.L. 1987 H.B. 518)